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HB 4691 – Presumption for Joint Legal Custody and Equal Parenting Time
Comments of the Michigan Poverty Law Program
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Chairman Runestad, members of the House Judiciary Committee, thank you for the opportunity to provide these comments expressing concerns regarding HB 4691. The Michigan Poverty Law Program – Family Law Task Force engages legal services advocates with interest and expertise in issues related to domestic violence, custody and other family law matters, particularly as they apply to low-income individuals.

HB 4691 changes current law by presuming equal custody is right for all Michigan families

- A presumption of equal custody relies on assumptions that are not true for all families. Not all families are similarly situated and have children with various needs. Equal custody works well where both parents share a commitment to what is best for their children and an ability to work together. In families where there is a history of domestic violence or high conflict, equal custody can be harmful to children.
- A presumption is triggered when parents are unable to agree on custody, including when one parent believes equal custody is unsafe, inappropriate or not in child's best interests. These are the cases that raise concerns about child safety and require more assistance; not a one size fits all solution.

HB 4691 relies on vague definitions that will create uncertainty, lead to more legislation and increase financial burdens on families

- Section (2)(l) defines "materially compromised" to mean "diminished outcomes that exceed minor deviations" without identifying any outcomes or how deviations will be measured. Diminished outcomes must "have a significant and profound" impact on the child, however, the definition fails to indicate what a profound impact included.
- The definition of "substantially equal parenting time" in section (2)(o) creates a vague and inflexible standard by requiring the court to "provide balance and equality in overnights" yet bars parenting time that exceeds 200 overnights.
- The bill re-defines the "best interest of the child" but fails to clearly indicate when the new factors apply and creates additional conflicting standards to measure what's best for children that apply to rebut the presumptions for an established custodial environment, joint legal custody and joint parenting time.

The bill contains multiple layers of presumptions, each of which must be individually overcome by a parent with genuine concerns about the safety and wellbeing of his/her child

- The standards for rebuttal vary, conflict and are not always focused on what is best for an individual child.
- The presumptions may only be rebutted by clear and convincing evidence – evidence indicating that the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of the evidence, the standard applied in most civil cases, including family law.

The bill provides conflicting definitions of what is in a child's best interests

- Sec 3 defines the best interests of the child and is applied to overcome the presumption that a parent has an established environment. However, the best interest factors already include a presumption that maintaining a relationship with each parent is in a child's best interest and that both parents contribute to the child's care.
- To rebut the presumption of reunification when a parent has been living apart from the child, the court does not apply the best interest factors but rather a list of unrelated factors in section 11 that fail to focus on a parent's relationship with the child.
- To rebut the presumption of joint legal custody, the court considers only evidence that the child's health, safety or well-being would be "materially compromised" with no direction to the court how to measure such an affect.
- Finally, to rebut the presumption for equal parenting time, rather than considering the child's best interests or the child's health, safety or wellbeing, the court considers the factors in section 11 that also apply to rebut the presumption of reunification, an outcome wholly distinct from equal parenting time.

Overcoming the presumptions in HB 4691 will be nearly impossible

- The evidentiary burden to rebut any one of the presumptions is high and will be unreachable by many parents, especially those with limited resources, unable to hire an attorney or representing themselves.
- Parents who believe joint or equal custody would be harmful, inappropriate or unworkable for their families must prove it by a high evidentiary standard of clear and convincing evidence.

HB 4691 creates a fictional established custodial environment between a child and parent

- Section 6a requires the court to presume that when the parents reside together, the parents have an established custodial environment with their children based on the assumption – true or not – that the children look to both parents equally for "guidance, discipline, the necessities of life and parental comfort."
- However, when parents live separately, the bill permits a parent to preserve what may be a fictional custodial environment with the child by notifying the court within 90 days of an intent to preserve the environment.
- Further, the bill rewards uninvolved parents who fail to provide 90 days notice of their intent to preserve their custodial environment with undetermined additional time to claim a custodial environment, and despite such a failure to provide notice, requires the court to provide "unification" between the child and uninvolved parent. There is no description of who provides unification, what it consists of and who pays the costs.

Presumptions of joint legal custody and equal parenting time places victims of domestic violence at risk

- Abusive parents who believe they have the right to control their partners through violence, intimidation and coercive controlling abuse are poor candidates for shared decision making and equal parenting time. Shared custody requires the parents to continue to have contact to make joint decisions or to exchange children. Such exchanges give abusers access to victim parents and children that allow ongoing abuse, an opportunity to exert continuing control over the victim's life and exposes children to a continuation of the abuse.
- HB 4691 eliminates domestic violence from a consideration of the best interests of the child.
- The only instance when domestic violence may be specifically raised is to rebut the presumption of substantially equal parenting time. However, the parent must prove domestic violence by clear and convincing evidence and a parent who lacks corroborating evidence of domestic violence will likely be punished for making a false allegation and lose custody.

A presumption of equal custody impoverishes families

- The bill permits the court to ignore the law regarding parents' responsibility to provide financial support for their children by permitting the court to reduce support payments if the parent who would pay support because of that parent's higher income is unable to provide housing for the child and the other parent has "sufficient resources."
- An award of equal custody does not guarantee both parents will be equally involved in caring for the child. Some parents seek equal custody as a subterfuge to a lower child support obligation, without spending equal time with children.
- Research has shown that equal custody results in increased litigation, particularly for a parent who believes it would be harmful to the child and increased cost to families, particularly poor families.

Rather than a presumption, family differences should be considered in the law

- Current law requires the court to "consider, evaluate and determine" the best interests of each individual child before reaching a custody determination. The best-interest approach keeps the court and parents focused on what is best for a particular child.

The presumptions in HB 4691 supplant this individualized, child-focused analysis and shifts the focus from the child to the needs of parents. For this reason, we respectfully request that you oppose HB 4691. Thank you for your consideration of these comments. If you have any questions or concerns, please do not hesitate to contact me, or MPLP's governmental affairs consultant, Jean Doss (see below).

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